Supreme Court, U.S.
FILED

No. 97 1131 JAN 5 1998

OF THE CLERK

# In The Supreme Court of the United States

**OCTOBER TERM 1997**

**VERN ODELL CRAWFORD,**

***Petitioner,***

**v.**

**UNITED STATES OF AMERICA,**

***Respondents.***

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

**Marvin D. Miller**
***Counsel of Record***
**Attorney at Law**
**Post Office Box 663**
**Alexandria, VA 22313**
**(703) 548-5000**

**Claude M. Scialdone**
**Barry R. Taylor**
**SCIALDONE & TAYLOR, INC.**
**Post Office Box 6116**
**Virginia Beach, VA 23456**
**(757) 430-1200**

***Counsel for Petitioner - Vern Odell Crawford***

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

40 pp

I.

## QUESTIONS PRESENTED FOR REVIEW

The Fourth Circuit Court of Appeals has decided in this case that a United States District Court is not required, sua sponte, to give the jury a credibility instruction on the status of a paid government informant, and by not giving such an instruction does not constitute plain error. Is that finding in conflict with the Tenth Circuit Court of Appeals holding that such a instruction, sua sponte, is absolutely required, and constitutes plain error if omitted?

Did the Fourth Circuit Court of Appeals commit reversible error when they held that under the Jencks Act that a 15 (fifteen) minute continuance to review 92 (ninety-two) pages of informant material was sufficient and further that any prejudice could be cured by recalling the informant as an adverse witness the next day of trial?

## TABLE OF CONTENTS


| | |
|---|---|
| QUESTION PRESENTED..... | (I) |
| TABLE OF AUTHORITIES..... | (iii) |
| | (iv) |
| OPINION BELOW..... | 1 |
| JURISDICTION..... | 2 |
| STATEMENT OF THE CASE..... | 2 |
| ANALYSIS..... | 3 |
| CONCLUSION..... | 8 |

## TABLE OF AUTHORITIES

**CASES:**

*United States v. Bosch*, 914 F.2d 1239, 1247-1248 (9th Cir. 1990)..... 4,5

*United States v. Brooks v. Johnson*, 928 F.2d 1403 (4th Cir. 1991)..... 4

*United States v. Holmes v. Aument v. Aument*, 722 F.2d 37 (4th Cir. 1983)..... 6,7,8

*United States v. Kelly*, 35 F.3d 929 (4th Cir. 1994)..... 8

*United States v. Miller*, 499 F.2d 736 (10th Cir. 1974)..... 3,5

*United States v. Swiderski*, 539 F.2d 854 (2nd Cir. 1976)..... 3

**UNITED STATES STATUTES:**

Title 26, Section 7203 of the United States Code..... 2

Title 18, Section 1503 of the United States Code..... 2

Title 18, Section 3500 of the United States Code..... 5

United States Constitution Article IV. Sec. 2..... 5

United States Constitution 14th Amendment..... 5

**OTHER AUTHORITIES:**

*Jury Practice and Instructions* by Devitt and Blackman (3rd ed. 1977)..... 3

**In The**
**Supreme Court of the United States**

October Term, 1997

---

Vern Odell Crawford,
Petitioner,

V.

United States Of America,

Respondent.

---

Petition for Writ of Certiorari to the
Supreme Court of the United States

---

Vern Odell Crawford, respectfully petitions for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals in this case.

## OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is set out in the Appendix, *infra*, 1a to 13a. That opinion affirmed the decision of the U.S. District Court of the Western District of Virginia, Harrisonburg Division, which is set out in the Appendix, *infra*, 14a.

## JURISDICTION

This case in the U.S. District Court for the Western District of Virginia, Harrisonburg Division, under 18 U.S.C. 1503, 26 U.S.C. Section 7203, in which the court had jurisdiction under 18 U.S.C. Section 3231 for offenses against the laws of the United States.

## STATEMENT OF THE CASE

Vern Odell Crawford, the Appellant, is a self-employed businessman and long-time resident of Elkton, Virginia. (JA., Vol. IV, p. 893). On September 21, 1995, a federal Grand Jury in Roanoke, Virginia indicted the Appellant on two charges of Failure to File a Federal Tax Return (26 U.S.C. Section 7203) and Obstruction of Justice (18 U.S.C. Sections 1503 and 2). (JA., Vol. IV, p.885). The Appellant was tried on these charges before the United States District Court for the Western District of Virginia with the Honorable Jackson L. Kiser presiding. After a three day trial on April 23-25, 1996, the jury found Mr. Crawford guilty on all three counts. (JA., Vol. I, p. 399, L. 19-24). He was subsequently released on bail until his sentencing hearing on October 3, 1996. Judge Kiser sentenced Mr. Crawford to 51 months imprisonment (JA., Vol. II, p.590, L.5-10) and fined him $100,000.00 (JA., Vol. II, p. 591, L. 19-23), plus costs of prosecution of $5,934.65 (JA., Vol. II, p. 596, L.3-6). The final sentencing order was entered on October 10, 1996. (JA., Vol.II, p. 598-604). This U.S. District Court and the Fourth Circuit Court of Appeals, after sentencing the Appellant, subsequently denied the Appellant's Motion for Stay of Execution of Sentence and Motion for Bail Pending Appeal. The Appellant is currently imprisoned in the Federal

prision at Lexington, Kentucky.

## ANALYSIS

**Question 1:**

The Petitioner claims that the Fourth Circuit Court of Appeals failed to recognize plain error committed by the United States District Court in not informing the jury, *sua sponte*, through an instruction that a government's chief and material key witness, Patricia Gail Littleton, was, in fact, a paid informant. Neither the defense nor the prosecution offered the instruction. The Tenth Circuit Court of Appeals in United States v. Miller, 499 F.2d 736 (10th Cir. 1974) stated that a cautionary instruction is **required** for an informant case when the individual supplying information is paid, as in the instant case. Miller, at 742. Devitt and Blackman's Jury Practice and Instructions (3rd ed. 1977) has adopted the principle from Miller and provided the following instruction in Section 17.02:

The testimony of an informer who provides evidence against a defendant for pay, or for immunity from punishment, or for personal advantage of vindication, must be examined and weighed by the jury with greater care than the testimony of an ordinary witness. The jury must determine whether the informer's testimony has been affected by interest or by prejudice against a defendant.

Moreover, where the Government's case rests primarily on the testimony of informers, as it did in this case, reversible error will lie if this instruction is not given. See United States v. Swiderski, 539 F.2d 854 (2nd Cir. 1976). In the instant case, the Government's conviction of the

Appellant for the charge of obstruction of justice depended solely on the testimony of Patricia Gail Littleton, the Government's paid informant.

The Fourth Circuit Court of Appeals considered the principle enunciated by Miller, supra, in United States v. Brooks v. Johnson, 928 F.2d 1403 (4th Cir. 1991) and declined to find error since the witness characterized as an informer, failed to fulfill criteria for informer, i.e., he was neither paid, promised immunity for his testimony, nor did he seek personal advantage or vindication thereby. Brooks, at 1409. However, Brooks did confirm the principle from Miller is applicable in the Fourth Circuit, i.e., a cautionary instruction is appropriate where an individual supplying information is a paid informant for the Government seeking a conviction in a criminal case. Moreover, failure to give such cautionary instruction is an abuse of discretion when the witness was, in fact, paid and/or received other consideration, i.e. being allowed to escape prosecution for tax evasion, as in the instant case. Brooks, at 1403.

The Fourth Circuit Court Of Appeals, in its holding in this case, relied on decisions from United States v. Bosch, 914 F.2d 1239, 1247-48 (9th Cir. 1990) (finding that the failure to give a paid informant instruction, *sua sponte*, is not plain error) and United States v. Cook, 102 F.3d 249,252 (7th Cir. 1996) (stating that decision of whether to give such an instruction, even in the face of a request from counsel, is discretionary with the trial judge). It is apparently clear that there is a clear conflict with the holdings in Bosch and Cook in comparison with the holding in Miller. The Tenth Circuit Court of Appeals requires that the lack of instruction to the jury, *sua sponte*, will constitute plain error, as opposed to the holdings in Bosch and Cook that hold such instruction is

discretionary, even upon request by either counsel.

The Fourth Circuit Court of Appeals has adopted the position held in Bosch and Cook and completely discarded the holding in Miller. In doing so, this has greatly impeded the rights of the petitioner to due process in violation of the 14th Amendment to the U.S. Constitution and the Privileges and Immunities clause of Article IV section II of the U.S. Constitution by denying him a new trial on the basis of plain error.

**Question 2:**

The Fourth Circuit Court of Appeals has additionally failed to recognize the petitioners rights to due process and rights created under this Honorable Court's holding in Brady v. Maryland, 83 S.Ct. 1194 (1963) and under the Jencks Act.

When Patricia Gail Littleton, the government's paid informant, took the stand at the Appellant's trial, the prosecution provided the Appellant's counsel, Frank Mika, with ninety-two (92) pages of reports documenting Littleton's clandestine meetings with the police while operating as a paid informant. The Government did not produce these materials in compliance with discovery claiming their exemption therefrom under 18 U.S.C. § 3500(a) (Jencks Act). Appellant's trial counsel, Mr. Mika, immediately made objections by making an oral motion for mistrial based on the government's failure to comply with discovery and to reveal exculpatory material or have her testimony stricken and that she be excluded from testifying (i.e., violation of Brady). The trial judge denied the Motion and, in lieu thereof, granted a continuance for a mere fifteen (15) minutes to afford the Appellant's counsel an opportunity to read and digest the

ninety-two pages of material of the utmost importance to the Appellant's defense. Mr. Mika, in his affidavit, asserts the obvious fact that fifteen (15) minutes was totally insufficient to adequately review the material and prepare therefrom for an effective cross-examination and defense strategy (See Affidavit in Appendix).

The Jencks Act, 18 U.S.C. § 3500 states, in part:

> "Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion...may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial. (Emphasis added).

In essence, trial counsel was given less than ten (10) seconds per page to read, digest and analyze the Jencks materials and formulate a cross-examination therefrom as well as a defense strategy to negate this explosive, prejudicial, and inflammatory material. One could hardly consider this reasonable or fair under our system of American justice. In United States v. Holmes v. Aument v. Aument, 722 F.2d 37 (4th Cir. 1983), defense counsel was provided a stack of Jencks material eight inches thick on the morning of the day before the trial. In vacating a judgment of conviction and granting a new trial, the Holmes court ruled that the district (trial) court abused its discretion and denied the defendant's rights under the Jencks Act.

In the Holmes case, the defense had roughly twenty-four (24) hours to review approximately two thousand (2,000) pages which amounted to forty-three (43) seconds per page. If the Fourth Circuit Court of Appeals found in Holmes that the defendants were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the day before the trial, then certainly, with only ten (10) seconds per page, one quarter as much time, the Appellant in the instant case was denied his rights. Since the Fourth Circuit Court of Appeals held in Holmes that the District Court had abused its discretion in failing to grant a reasonable delay in the progress of the trial to permit counsel to complete their studies and preparation (of the Jencks material) and granted Appellant a new trial, the District Court in the instant case has, a fortiori, abused its discretion and the Appellant should likewise be granted a new trial. Id. at 41.(Emphasis Added).

The Fourth Circuit Court of Appeals held that petitioner did not make a contemporaneous objection that the fifteen minute recess was insufficient to allow proper review of the material. Because of the failure to object, the court reviewed the matter as plain error and found that none existed. The Fourth Circuit Court of Appeals committed error by stating that defendant failed to object to not being given sufficient time to review the Jencks materials, however, the Court failed to recognize that Mr. Mika did object not once but twice and was overruled on both objections (motion to exclude the witness and motion to declare a mistrial) (see Appendix.). To continue to object for a continuance or

adjournment would have been fruitless. This issue was preserved for appeal purposes. The Fourth Circuit Court of Appeals failed to follow their own holding in Holmes and, in fact, failed to even address the Holmes case in relation to the instant case.

Another fact that is critical to the analysis here is that the Assistant United States Attorney advised to the defense attorney that there was no informant when in fact there was an informant. This is patently unfair and prejudicial to the trial process to condone such conduct by the Government to the defense attorney, then have the defense rely on those false representations and get surprised at trial by ambush. See U.S. v. Kelly, 35 F.3d 929 (4th Cir. 1994).

The Fourth Circuit Court of Appeals has now caused an inconsistency in the proper interpretation of the Jencks Act. In Holmes the Court held that 24 (twenty-four) hours was not sufficient time to review 2,000 pages of documents, but that 15 (fifteen) minutes is sufficient time to review 92 pages of documents. If the Court had applied its holding in Holmes, then even if the defense had been given 66 (sixty-six) minutes to review the material, that would not be an adequate amount of time to review the material. Clearly, the Fourth Circuit Court of Appeals has now created an inconsistent ruling within the Courts own holdings, and has unduly prejudiced the petitioner.

## CONCLUSION

The Fourth Circuit Court of Appeals ruling in this case on the issue of *sua sponte* jury instructions on paid government informants is in clear conflict with the holding from the Tenth Circuit Court of Appeals. Additionally, the

Fourth Circuit Court of Appeals has unduly prejudiced the petitioner by not applying its own holding in Holmes to the issue of adequate time to review new materials entered into a trial under the Jencks Act. Since the Fourth Circuit Court of Appeals has created inconsistencies that have greatly affected the petitioner by denying him a new trial, this Court should use its supervisory capacity to correct the Fourth Circuit Court of Appeals. This court should overrule the decisions of the trial and appeals court and remand this case to the trial court with an order for a new trial.

RESPECTFULLY SUBMITTED

VERN ODELL CRAWFORD

Marvin D. Miller, Esquire
PO Box 663
Alexandria, VA 22313
(703) 548-5000
Counsel For Petitioner

Claude M. Scialdone, Esquire
Barry R. Taylor, Esquire
Scialdone & Taylor, Inc.
PO Box 6116
Virginia Beach, VA 23456
(757) 430-1200
Counsel For Petitioner

UNPUBLISHED

# UNITED STATES COURT OF APPEALS

## FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

v.

VERN ODELL CRAWFORD,
*Defendant-Appellant.*

No. 96-4785

Appeal from the United States District Court
for the Western District of Virginia at Harrisonburg.
Jackson L. Kiser, Senior District Judge.
(CR-95-70108)

Argued: June 3, 1997

Decided: August 29, 1997

Before HALL and MICHAEL, Circuit Judges, and
TILLEY, United States District Judge for the
Middle District of North Carolina, sitting by designation.

---

Affirmed and remanded by unpublished per curiam opinion.

---

## COUNSEL

**ARGUED:** Barry Ray Taylor, SCIALDONE & ASSOCIATES, Virginia Beach, Virginia, for Appellant. Michael Emile Karam, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Claude M. Scialdone, G. Paul Martin, Third Year Law Student, SCIALDONE & ASSOCIATES, Virginia Beach, Virginia, for Appellant. Loretta C. Argrett,

Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Robert P. Crouch, Jr., United States Attorney, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

---

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

---

## OPINION

PER CURIAM:

Vern Odell Crawford was convicted of two counts of willful failure to file a federal tax return in violation of 26 U.S.C. § 7203 and one count of obstruction of justice in violation of 18 U.S.C. § 1503. He appeals those convictions on several bases. Finding no reversible error, we affirm but will remand so that the district court may consider the motion for a new trial which was filed after this appeal was noticed.

### I.

During 1989-90, Appellant Vern Odell Crawford operated a variety of businesses in Elkton, Virginia. These businesses included a grocery store and gasoline station, an automobile wrecker service, a used car and truck business, and a cattle and horse farm. He also owned several rental properties in the area. Crawford paid all of his employees in cash and transacted much of his business in cash. Up until May 1992, he did not deduct social security or taxes from his employees' pay.

Crawford filed timely tax returns from 1979 to 1983. Beginning in 1984, however, he either failed to file or filed late returns. For the years 1987, 1991, 1992, 1993 and 1994, Crawford filed no tax returns. He filed late returns from 1984 through 1986. For 1988 and the prosecution years, 1989 and 1990, Crawford did not have his

returns prepared until May 18-19, 1992 and did not file them until May 22, 1992 (postmarked on May 19, 1992).

On May 18, 1992, Jack Higginbotham, a special agent for the IRS, contacted Crawford to tell him that he needed to talk to Crawford about his tax liability for the years 1988 through 1991. That evening Crawford went to his accountant's home and told his accountant that he needed to file the returns for those years. The two, along with Crawford's wife, prepared the returns throughout the night and mailed them, along with payment checks, on May 19, 1992 before Crawford met with Mr. Higginbotham.

The investigation continued and a grand jury proceeding was held in December 1992. The night before that hearing, Patricia Gail Littleton, an employee of the Crawfords and a paid informant for the state police, went to Crawford's home. She testified that he instructed her how to answer questions to the grand jury and made a statement which she interpreted as a threat should she not comply. Another witness, Tina Marie Shifflett, the girlfriend of Crawford's son, testified that Crawford told Littleton to go and tell the truth. After Littleton testified before the grand jury, Crawford came to see her and asked her what questions the grand jury had asked. Littleton also testified that Crawford said that he would get a transcript of her testimony and would know what she said.

Another former employee, Diane Meadows, testified at trial that she was approached by Crawford and his family after she left his employ. She was asked whether government agents had been to see her. She responded that they had, that she had told them about her wages ($4.00 an hour) and the method in which she was paid (cash) while she worked for Crawford. She also told Crawford that the agents showed her a paper she had signed while working for him stating that she would be responsible for her own taxes. She testified Crawford responded that "someone had crossed him by them having that paper."

II.

A.

Crawford first argues that there is insufficient evidence to sustain his convictions for failure to file federal tax returns and for obstruc-

tion of justice. "In reviewing the sufficiency of the evidence to support a conviction, the relevant question is 'whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt.'" *United States* v. *Saunders*, 886 F.2d 56, 60 (4th Cir. 1989) (citations omitted).

1. *Failure to file*

Crawford was prosecuted under 26 U.S.C. § 7203 which makes it a crime to "willfully fail to pay[ ] such estimated tax or tax, [or] make such return . . . at the time or times required by law." To prove a violation of § 7203, the Government must show that the defendant was (1) required to file a return; (2) failed to file the return; and (3) that the failure to file was a willful failure. *United States* v. *Ostendorff*, 371 F.2d 729, 730 (4th Cir.), *cert. denied*, 386 U.S. 982 (1967). The Supreme Court has determined that wilfulness under the statute means "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 201 (1991).

Crawford contends that there is insufficient evidence to sustain his conviction because he filed his tax returns for 1989 and 1990 after an IRS agent contacted him to set up an appointment to discuss his tax liability for those years but before the agent informed him that the investigation was criminal in nature. In support of his contention, Crawford states that he is functionally illiterate and that he is totally dependent on others for his bookkeeping, reporting and filing activities. He states that he was not aware that he had failed to file and thought that he had filed. Further, Crawford cites section (20)(122) ¶2 from the IRS manual in support of his position. That provision states:

> Compliance is achieved when a taxpayer makes a diligent effort to meet the requirement of the law. The law requires that the taxpayer take affirmative action to meet his/her requirements. Sometimes, the taxpayer takes sufficient action to meet the requirements but, because of some unforeseen intervening event, is unable to do so. Affirmative action recognizes that the obligation to meet the requirement

> is ongoing and requires that the taxpayer continue to attempt to meet the requirements, even though late.

Even if this provision could be read to support Crawford's position, the manual does not confer any substantive rights on taxpayers but is instead only an internal statement of penalty policy and philosophy. *See, e.g., Unites States v. Caceras*, 440 U.S. 741 (1979); *United States v. Groder*, 816 F.2d 139, 142 (4th Cir. 1987). In addition, delinquent filing of a return does not relieve a tax payer of criminal liability. *United States v. Ming*, 466 F.2d 1000, 1005 (7th Cir.), *cert. denied*, 409 U.S. 915 (1972); *United States v. McCormick*, 67 F.2d 867, 868 (2nd Cir. 1933), *cert. denied*, 291 U.S. 662 (1934). Crawford filed his tax returns on time from 1979-83 and he filed late or not at all from 1984-94. Evidence that a defendant has filed delinquent tax forms before or no tax forms at all can be evidence of willfulness. *See, e.g., United States v. Greenlee*, 517 F.2d 899, 903 (3rd Cir.), *cert. denied*, 423 U.S. 985 (1975); *United States v. Farris*, 517 F.2d 226, 229 (7th Cir.), *cert denied*, 423 U.S. 892 (1975); *United States v. Upton*, 799 F.2d 432, 433 (8th Cir. 1986). There was sufficient evidence to sustain a conviction based on a § 7203 violation.

### 2. *Obstruction of Justice*

Crawford challenges the sufficiency of the evidence to support his conviction for obstruction of justice under 18 U.S.C. § 1503. The three elements of that crime are (1) that a judicial proceeding was pending; (2) that the defendant had knowledge of the judicial proceeding; and (3) that the defendant acted corruptly, that is, with the intent to influence, obstruct, or impede that proceeding in its due administration of justice. *United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993). The Government's evidence consisted of testimony from Patricia Gail Littleton that Crawford instructed her how to answer questions before the grand jury. Further, Littleton testified that Crawford made the statement that "if he found out who went up there and told things on him, he would have them taken care of," which Littleton interpreted as a threat of bodily harm. Crawford claims that Littleton's testimony was internally inconsistent and that it was contradicted by the testimony of Tina Marie Shifflett. This is basically an attack on the credibility of Littleton and "assessing the credibility of witnesses is within the province of the jury." *United States*

v. *Johnson*, 55 F.3d 976, 979 (4th Cir. 1995). Generally, unless there is a serious deficiency in the evidence, "this court is bound by the credibility determinations of the jury." *United States* v. *Saunders*, 886 F.2d 56, 60 (4th Cir. 1989). A review of the testimony reveals that any inconsistencies in Ms. Littleton's testimony are not serious in nature and are such that the jury could certainly choose to believe her testimony over Tina Marie Shifflett's testimony.

B.

Crawford alleges that the failure to disclose information about Littleton's status as a paid informant for the local police violated the *Brady* rule and violated the Joint Discovery and Inspection Order reached by the parties and entered by the trial court. Before trial, Crawford's counsel allegedly asked the Assistant U.S. Attorney whether Patricia Gail Littleton had any agreements with the government or the local police. The Assistant U.S. Attorney allegedly replied that there were none. In fact, Ms. Littleton had been paid almost $1400 over two years to be an informant for the Rockingham County Sheriff's Department. The Virginia State Police provided the funding for the payments and compiled a file documenting the meetings with Littleton. This arrangement was first revealed to Crawford's counsel during Littleton's direct examination. The trial court allowed a fifteen minute recess to give Crawford's counsel time to review the documents and also allowed Crawford to recall Littleton as an adverse defense witness. Crawford's attorney did not indicate to the court that he needed additional time to review the documents but moved for a mistrial on the basis that the Government committed a *Brady* violation and therefore deprived Crawford of due process. The trial court denied the motion. "A district court's refusal to grant a mistrial will be reversed only for an abuse of discretion." *United States* v. *Guay*, 108 F.3d 545, 552 (4th Cir. 1997).

The *Brady* rule requires that the prosecution disclose exculpatory evidence and information which could be used to impeach Government witnesses if the information is material. Information is material if, with the disclosure, there would have been a "'reasonable probability' of a different result." *Kyles* v. *Whitley*, 115 S. Ct. 1555, 1566 (1995). The Supreme Court has further stated that

> [t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

*Id.* (citations omitted). When disclosure has come late in the game, this Court has stated that "[n]o due process violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial." *United States v. Smith Grading and Paving, Inc.*, 760 F.2d 527, 532 (4th Cir.), *cert. denied*, 474 U.S. 1005 (1985). In this case, Crawford's attorney was able to cross-examine Littleton on her status as a paid informant and was able to recall her as an adverse defense witness later in the trial. Although, the information about her status as a paid informant was brought out and Crawford was able to use the information in closing argument, he argues that he was (1) deprived of the opportunity to further investigate Littleton's background for impeachment material; (2) denied the opportunity to explore an entrapment defense; (3) denied the opportunity to explore illegal search and seizure arguments; and (4) was unable to use the information in opening statement. Crawford, however, must show that at least one of these avenues, if he had been allowed to explore it, would have resulted in a reasonable probability of a different outcome. He has made no such showing.

Crawford also asserts for the first time on appeal that the failure to reveal that Littleton had a serious drinking problem in the past, had been charged with crimes several times, had convictions in the Virginia court system, and had failed to report income from Crawford on her federal tax forms, was a *Brady* violation. The information concerning Littleton's drinking habits and her tax filing situation were brought out on cross-examination. At trial, Crawford did not object to the Government's failure to disclose the information regarding these topics. He has therefore failed to preserve this argument.

Failure to disclose the prior criminal convictions and charges is likewise not a *Brady* violation. According to the documents submitted

in the Joint Appendix, each of the charges involved automobile violations and, therefore, did not relate to credibility in such a way as to "undermine confidence in the outcome of the trial."

C.

Crawford claims that the trial judge's failure to give the jury an instruction on Littleton's status as a paid informant was an abuse of discretion. At trial, Crawford neither requested such an instruction nor objected when none was given. Therefore, he can not be heard to complain unless the failure to give such an instruction is plain error under Rule 52(b) of the Federal Rules of Civil Procedure. The trial court's failure to give such an instruction, *sua sponte*, in this case is not plain error. *See, e.g., United States v. Bosch*, 914 F.2d 1239, 1247-48 (9th Cir. 1990) (finding that the failure to give a paid information instruction, *sua sponte*, is not plain error); *United States v. Cook*, 102 F.3d 249, 252 (7th Cir. 1996) (stating that the decision of whether to give such an instruction, even in the face of a request from counsel, is discretionary with the trial judge).

D.

1. *Prosecutorial delay*

Crawford alleges that he has been prejudiced by the pre-indictment delay in this case. Because the delay occurred before Crawford became the "accused," the Sixth Amendment does not apply. *United States v. Marion*, 404 U.S. 307 (1971). However, "the Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [appellant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." *Id.* at 324.

The trial court held a hearing on prosecutorial delay out of the presence of the jury. At the hearing, the agent responsible for the investigation during 1993-95 testified that the case spent much time during those years being reviewed by various individuals within the IRS and the Justice Department in order to determine the best theory of prose-

cution. He stated that by 1993 he had about 90% to 95% of the information actually used in this prosecution but, at that time, the investigation was targeted toward making a tax evasion or false return case. Much of the information needed to prosecute such a case was not received until after 1993, with some bank records not subpoenaed until six months to a year preceding the trial. The trial judge determined that the defense had shown neither substantial prejudice or improper prosecutorial motive for the delay and we agree.

### 2. *Jencks Act violation*

The Jencks Act provides, in pertinent part,

> [w]henever any statement is delivered to a defendant pursuant to this section, the court in its discretion . . . may recess proceedings in the trial for such a time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

18 U.S.C. § 3500(c). In this case, 92 pages of material concerning Littleton's position as an informant for the local police was given to Crawford's attorney when Littleton took the stand. Crawford moved for a mistrial based on the government's failure to provide this material earlier and the trial court denied this motion (discussed, *supra*, Part II.B.). Instead, the court recessed the proceedings for fifteen minutes to give counsel an opportunity to review the documents. Crawford made no objection that the time given was insufficient when the proceedings resumed. In addition, the court allowed Crawford to recall Littleton later in the trial as an adverse defense witness.

Crawford did not make a contemporaneous objection that the fifteen minute recess was insufficient to allow proper review of the material. Because of the failure to object, we review this matter for plain error under Rule 52(b). We find no plain error here. Although the fifteen minute recess may not have been entirely sufficient, the trial court allowed the witness to be recalled as an adverse defense witness later in the trial. Any prejudice resulting from the short length of the recess was certainly removed by Crawford's opportunity to recall the witness at a later time.

### 3. *Trial judge's questions*

Crawford claims that the trial judge abused his discretion in questioning a key defense witness, Tina Marie Shifflett. Shifflett is the witness who contradicted Littleton's testimony concerning what Crawford told Littleton the night before she was to testify before the grand jury. During Shifflett's testimony, the trial judge asked her ten questions.* Crawford contends that these questions reveal a bias

---

*The following are the questions and answers (not all occurred in one exchange):

| | |
|---|---|
| COURT: | Now, why did it take you from the end of '89 to 1992 to come up with the 1989 records? |
| SHIFFLETT: | Well, we had several businesses and I just got behind. |
| COURT: | Well, that's about three years. |
| SHIFFLETT: | Yeah. |
| COURT: | Were you behind three years on your record keeping? |
| SHIFFLETT: | I guess you could say that, yes. |
| COURT: | What efforts were made to help you become current? |
| SHIFFLETT: | Well I called the accountant, Doug, to help me several times, but I never got no reply. |
| COURT: | Did you go to Mr. Odell [sic] and say I can't handle this, get somebody else to do it? |
| SHIFFLETT: | No. |
| COURT: | What training have you has in bookkeeping, Ms. Shifflett? |
| SHIFFLETT: | None. |
| COURT: | Well, how to you hold yourself out to be a bookkeeper if you've has no training? |
| SHIFFLETT: | I don't call myself a bookkeeper. |
| COURT: | Well, what do you call yourself? |
| SHIFFLETT: | I'm just trying to help them out. |
| COURT: | If they asked you to translate Chinese into |

against the witness and that the last question "If they [the Crawfords] asked you to translate Chinese into English, would you try to do that?" was the most prejudicial.

This Court has stated that "if the trial judge's behavior whether in commenting or in interrogating witnesses during trial reaches such a level of prejudice 'that it denied any or all the appellants a fair, as distinguished from a perfect, trial,' a new trial is required." *United States v. Parodi*, 703 F.2d 768, 776 (4th Cir. 1983) (citations omitted). In view of Ms. Shifflett's answers to the Court's earlier questions, we do not believe the final question was prejudicial.

E.

After the trial, Crawford discovered that Littleton had allegedly attempted to get at least four people to commit perjury regarding the circumstances of an accident which resulted in a driving while intoxicated charge against her. Based on this evidence, Crawford contends that he should be granted a new trial.

First, the government states that this issue has been presented to, and not yet resolved by, the trial court. Therefore, the government asserts that this issue is not properly before this Court. We agree and will, therefore, remand to the district court for consideration of this issue.

The timing of the motion for a new trial presents a jurisdictional question which we must resolve in determining whether other issues are properly before us. Federal Rule of Criminal Procedure 33 provides, in pertinent part, "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case." Federal Rule

---

English, would you try to do that?

SHIFFLETT: If it would help them, yes.

(J.A. 360-61, 366).

of Appellate Procedure 4(b) provides that motions based on newly discovered evidence which are filed before or within 10 days after entry of judgment render notices of appeal ineffective. Federal Rule of Criminal Procedure 45 provides that computation of time for a period under 10 days is calculated by starting with the day following the event and then counting forward, excluding weekends and holidays. Federal Rule of Appellate Procedure 26 provides that, when computing periods under 7 days, weekends and holidays are excluded but that, when computing longer periods, those days are included. The motion for a new trial in this case was entered 12 calendar days after the entry of judgment. In this instance, we compute time for filing according to the rule in Federal Rules of Appellate Procedure. Therefore, the motion was filed outside of the ten day window provided in Rule 4(b) and this court has jurisdiction to consider the appeal.

F.

Crawford alleges that the district court imposed a fine of $100,000 without properly considering the factors enumerated in 18 U.S.C. § 3572(a). Section 3572(a) states that the sentencing court, in determining whether to impose a fine, the amount of the fine, and the timing and the method of payment, shall consider (1) the defendant's income, earning capacity, and financial resources; (2) the burden which will be imposed on the defendant and any dependents; (3) any pecuniary loss inflicted on others by the offense; (4) whether restitution is ordered and the amount of the restitution; (5) the need to deprive the defendant of illegally obtained gains from the offense; (6) the expected costs to the government of confinement and supervision; (7) whether the defendant can pass the cost of the fine onto others; and (8) if the defendant is an organization, the size of the organization and the efforts taken by the organization to discipline any agent responsible for the offense. This Court has stated that failure of the district court to enter factual findings on these factors can so inhibit appellate review as to warrant that the sentence be vacated and the case remanded so that such findings can be made. *United States v. Harvey*, 885 F.2d 181 (4th Cir. 1989). In this case, the district judge found that Crawford had the ability to pay the fine (J.A. 591). In addition, the district court adopted the findings in the pre-sentence report [PSR]. The PSR set out IRS estimated income for the defendant for 1984 through 1990. It also stated that Crawford and his family owned

property worth approximately one million dollars. Factual findings set out in a PSR and adopted by the district court may be sufficient for sentencing purposes. *United States v. Castner*, 50 F.3d 1267, 1277 (4th Cir. 1995). Furthermore, Crawford did not object to the imposition or calculation of the fine at sentencing. Therefore, he has waived review absent plain error. *Id.* This Court has affirmed fines under § 3572(a) when the district court adopted factual findings in a PSR which were sufficient to support the § 3572(a) factors and the defense failed to object. *See, e.g., id.*; *United States v. Taylor*, 984 F.2d 618 (4th Cir. 1993).

III.

For the reasons stated above, we affirm the judgment of the district court and remand the case so that the district court may consider the motion for a new trial.

*AFFIRMED AND REMANDED*

ENTERED

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA

United States of America
v.
Vern Odell Crawford

Judgment in a Criminal Case
(Offenses committed on or after 11/1/87)
Case No.: 5:95CR70108-001

Claude M. Scialdone, Esq.
Defendant's Attorney

THE DEFENDANT:

[X] was found guilty on count(s) 1,2,3
after a plea of not guilty

| Title & Section | Nature of Offense | Date | Count |
|---|---|---|---|
| 18 U.S.C. 1503 2 | Obstruction of Justice | 9/22/95 | 1 |
| 26 U.S.C. 7203 | Willful Failure to File Federal Tax Return | 4/15/91 | 2,3 |

Defendant's Soc. Sec. No.: 227-60-5191
Defendant's Date of Birth: 4/28/44
Defendant's USM No. 06713-0804

Defendant's Residence and Mailing Address:
Route 4, Box 266, Elkton, VA 22827

Date of Imposition of Judgment: 10/2/96

Jackson L. Kiser
Chief U.S. District Judge
10/10/96

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 51 month(s).

(51 months as to Count 1, 12 months as to Count 2 and 3, to run concurrently)

[X] The court makes the following recommendations to the Bureau of Prisons:

1. Defendant receive physical examination
2. Defendant be place in facility to accommodate any health problems found

[X] The defendant is remanded to the custody of the United States Marshall.

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 year(s)

(3 years as to Count 1, 1 year as to Counts 2 and 3, to run concurrently)

The defendant shall not commit another federal state or local crime.
The defendant shall not illegally possess a controlle substance.

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921

## SPECIAL CONDITIONS OF SUPERVISION

1. Defendant shall provide the probation officer with access to any requested financial information.

2. Defendant shall participate in a program of testing and treatment for substance abuse, as directed by the probation officer, until such timw as the defendant is released from the program by the probation officer.

3. Defendant shall reside in a residence free of firearms and destructive devices.

4. Defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of illegal controlled substances and or firearms.

## CRIMINAL MONETARY PENALTIES

| Assessment | Fine | Restitution |
|---|---|---|
| $100.00 | $100,000 | $ |

## SCHEDULE OF PAYMENTS

☒ in full immediately

☒ The defendant shall pay the cost of prosecution. $5,934.65

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report except (see attachment if necessary):

Court ruled that the two point enhancement for obstruction does not apply.

Guideline Range Determined by the Court:

Total Offense Level: 20
Criminal History Category: III
Imprisonment Range: 41 to 51 months
Supervised Release Range: 3 years as to Count 1
1 year as to Counts 2 & 3
Fine Range: $7,500.00 to $292,388.00

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

Affidavit

I, Frank A. Mika, hereby affirm as follows:

That prior to Odell Crawford's trial, during an open discovery meeting, I, Frank A. Mika, asked Thomas Eckert, the Assistant United States Attorney, what, if any, agreements Gail Littleton had with local or federal law enforcement officers. The response was none.

On the basis of that statement I prepared a hand written Motion to Dismiss due to the fact that Ms. Littleton had been paid by law enforcement officers and notes of her meetings were only given to us after she took the stand.

Frank A. Mika

State of Virginia, At Large:
City of Waynesboro, to-wit:

The foregoing signature was sworn and subscribed to before me this 24th day of October 1996.

My Commission Expires: May 31, 1999.

Tammy V. Campell, Notary Public

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED: October 1, 1997

No. 96-4785
CR-95-70108

U.S. v. Crawford

---

MANDATE

---

The judgment of this Court dated 8/29/97 takes effect today.

PATRICIA S. CONNOR,
CLERK

UNITED STATE COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed: September 23, 1997

No. 96-4785
CR-95-70108

UNITED STATES OF AMERICA

Plaintiff - Appellee,

v

VERN ODELL CRAWFORD

Defendant - Appellant

On Petition for Rehearing with Suggestion for Rehearing En Banc

The Appellant's petition for rehearing and suggestion for rehearing *en banc* were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing *en banc*, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the Petition for rehearing and suggestion for rehearing *en banc* are denied.

For the Court,

Patricia S. Connor, Clerk

## 26 U.S.C. §7203

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or by regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year".

18 U.S.C. §1503

INFLUENCING OR INJURING OFFICER OR JUROR GENERALLY.

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice shall be punished as provided in subsection (b).

(b) The punishment of an offense under this section is...

(3) In any other case, imprisonment for not more than 10 years, a fine under this title, or both.

## 18 U.S.C. §3500

## DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES

Section 3500 provides in part:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as herein after defined) of the witness in the possession of the United States which releates to the subject matter as to which the witness has testifed. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

Article IV. provides in pertinent part

Article IV. of the Constitution of the United States

Section 2.
(Privileges and Immunities, Fugitives)

The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Amendment XIV. of the Constitution of the United States
Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.